

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6041

ORIGINAL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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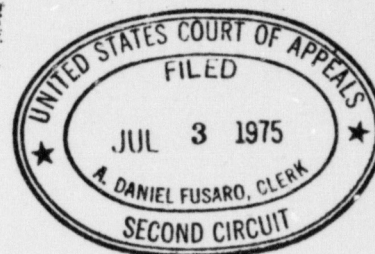
JOHN L. BEATTIE, JR.,
Appellant

v.

UNITED STATES OF AMERICA and
DONALD M. CERRA, Special Agent
of the Internal Revenue Service

Appellees

Docket No. 75-6041



BRIEF FOR APPELLANT

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SECOND CIRCUIT

Docket No. 75-6041

Preliminary Statement

This is an appeal from an order of the District Court for the Western District of New York (App. 17) (Hon. Harold P. Burke) overruling the Appellant's (taxpayer's) claim of privilege under the Fifth Amendment to the United States Constitution, and directing the enforcement of a summons served upon him. The summons (App. 6) requires the taxpayer to appear before Special Agent Donald M. Cerra of the Internal Revenue Service to give testimony relating to his own tax liability, and to bring with him and produce for examination accountant's workpapers in the taxpayer's possession used in the preparation of his tax returns for the years 1968 through 1972. The order of the Court below is not officially reported.

The following issue is presented for review on this appeal:

Whether the taxpayer, a sole proprietor, having properly asserted his Fifth Amendment rights in an income tax special investigation, must nevertheless give testimony relating to his own tax liability, and produce workpapers for examination, before a special agent of the Internal Revenue Service pursuant to summons, which workpapers were prepared by his accountant and were continuously in the taxpayer's rightful possession for a period of almost eight months before the summons was served upon him.

STATEMENT OF THE CASE

On or about January 9, 1974, Donald M. Cerra, a special agent of the Internal Revenue Service, and another agent, called on the taxpayer and stated that they had been assigned to investigate his federal income tax returns for the years 1968 or 1969 through 1972. At that time, to the best of the taxpayer's recollection, Special Agent Cerra informed him that he was investigating the possibility of criminal fraud, and advised him that he had a constitutional right to remain silent and to retain counsel. (App. 14). On or about January 18, 1974, James W. Richards, the taxpayer's attorney, obtained from the taxpayer's accountant, Arthur W. Robeson, various workpapers, trial balances, and schedules which Robeson had prepared as the taxpayer's accountant for him and for his business, Canteen Vending Company of Rochester, a sole proprietorship. On or about the same day, Richards delivered those papers to the taxpayer, and the papers have been in the taxpayer's continuous possession since that time.

Richards so obtained and delivered the papers to the taxpayer as the taxpayer's attorney, and with the taxpayer's knowledge and consent. (App.14,16). Since Beattie had paid Robeson for his accounting services, including the preparation of the papers, and Robeson had no need for them, Robeson felt that the taxpayer was entitled to have them if he so desired and therefore turned them over to Richards for delivery to the taxpayer. (App. 16). The papers are, and since delivery to him have been, in the taxpayer's continuous possession, and the taxpayer has continuously regarded them as his sole property. (App.14,15).

On September 13, 1974, Special Agent Cerra served a copy of a summons on the taxpayer requiring that the taxpayer appear before Cerra on September 23, 1974 to give testimony relating to the taxpayer's tax liability for the years 1968 through 1972, and to produce for examination the workpapers in his possession used in the preparation of the individual tax returns of taxpayer and Margaret Beattie for those years, including trial balances, balance sheet, adjusting entries, closing entries, notes, memorandums and correspondence used in the preparation of the returns. (App. 6,7). The papers in the taxpayer's possession are among those described in the summons. (App. 15).

On September 23, 1974, in response to the summons, the taxpayer appeared at the offices of Special Agent Cerra accompanied by his attorneys, Sydney R. Rubin and James W. Richards. At that time, and upon advice of counsel, the taxpayer personally stated that he was asserting his privilege under the Fifth Amendment of

the United States Constitution and was declining to give testimony or to produce the papers on the ground that, to do so, might tend to incriminate him. The taxpayer's attorney also invoked the Fifth Amendment privilege on behalf of the taxpayer. (App.13,15).

On January 7, 1975, the government, upon Order to Show Cause, filed a petition in the Court below to enforce the summons. (App. 2, 3). The Taxpayer filed an answer thereto on or about January 13, 1975. (App. 9). The answer alleges, inter alia, that, upon information and belief, Special Agent Cerra was conducting an investigation for the principal purpose of determining whether to recommend that criminal prosecution be instituted against the taxpayer with respect to his returns for the years 1968 through 1972; that the papers sought by the summons are the property of the taxpayer and in his lawful possession, and have been his property and in his lawful possession for a long and continuous period of time prior to the service of the summons; and that the taxpayer has a Fifth Amendment privilege, which he has properly asserted, to decline to give testimony or to produce for examination the papers demanded by the summons. (App.10,11). The government filed no opposing affidavits or written denial of the statements of fact contained in the answer or in the affidavits submitted on taxpayer's behalf.

The matter was argued before Judge Burke on January 27, 1975. Taxpayer's counsel stated that he would like to have witnesses testify, but the Court declined to hear witnesses. (Transcript of proceedings, January 27, 1975, pp. 8,9).

On May 16, 1975, the Court below signed an order (entered on

May 19, 1975) overruling the taxpayer's claims of privilege under the Fifth Amendment and his further grounds for refusing to comply with the summons, and directed that the summons be enforced. The order contains no findings of fact or conclusion of law, and states no basis for the Court's decision. (App. 17).

The taxpayer has duly appealed to this Court from that order. (App. 23). Following denial of taxpayer's motion for a stay in the Court below, the taxpayer sought a stay from this Court.¹ On June 16, 1975, this Court granted the motion for stay pending determination of this appeal, upon specified conditions with which the taxpayer has since complied.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege is not limited to verbal testimony. It applies with equal force to a taxpayer's books, records, and personal papers. For these are equally testimonial and communicative of the taxpayer's personal, private and financial affairs. Boyd v. United States, 116 U.S. 616; Schmerber v. California, 384 U.S. 757, 763-764; Bellis v. United States, 417 U.S. 85, 87-88.

The government recognizes this, and does not seek to compel the taxpayer to produce his ledgers, journals, and books of account. But the accountant's workpapers, which the government would compel the taxpayer to produce, are no less privileged in the taxpayer's hands. For the "trial balances, balance sheet,

1. The District Court's denial of a stay was verbal only. See transcript of proceedings May 27, 1975, pp. 10,11.

adjusting entries, closing entries" etc. (App. 6) are but summaries of the same information. They are no less communicative, testimonial or private than the privileged records from which they are derived, and therefore equally protected by the Fifth Amendment when the government seeks to compel the taxpayer to produce them. The privilege is not limited to entries or schedules which the taxpayer makes personally with his own hand. Wilson v. United States, 221 U.S. 361, 378.

While the taxpayer views the workpapers as his property (App. 15), and the government has not shown otherwise, it is possession -- not technical rules of property ownership -- which is the crucial factor in this case. And it has not and cannot be disputed that the taxpayer was in rightful possession of the workpapers for almost eight months before the summons was served upon him. "The rights and obligations of the parties became fixed when the summons was served * * *." Couch v. United States, 409 U.S. 322, note 9.

The Supreme Court, in Couch, supra, held that actual possession, rather than ownership, "bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime." Couch v. United States, 409 U.S. at 333. In this connection, the Court cited United States v. Cohen, 388 F.2d 464 (C.A. 9th), a case on all fours with this case, and noted that, "The Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." 409 U.S.

322, note 12.

Thus, in the present case, the Fifth Amendment ingredients of (1) personal compulsion against the taxpayer, (2) the testimonial and communicative nature of the workpapers, and (3) the taxpayer's rightful possession of the workpapers in a personal capacity, are all present. The taxpayer therefore had a privilege under the Fifth Amendment to decline to testify and to produce the workpapers, and properly asserted his privilege.

On January 27, 1975, the United States Supreme Court granted certiorari in United States v. Kasmir, 499 F.2d 444 (C.A. 5th) and United States v. Fisher, 500 F.2d 683. In both cases a principal issue is whether the Fifth Amendment privilege applies to papers prepared by taxpayers' accountants which were in the taxpayers' possession very briefly, and then delivered to their respective attorneys. The Fifth Circuit held in Kasmir that the privilege applied; the Third Circuit held in Fisher that it did not. The issue in those cases is thus similar to the issue in this case, with one very important difference: in Kasmir and Fisher the summons seeks to compel the attorney -- not the taxpayer -- to produce the papers. In both of those cases the element of personal compulsion against the taxpayer himself was thus lacking. Accordingly, irrespective of how the Supreme Court resolves the conflict between Kasmir and Fisher, the Fifth Amendment privilege applies on the undisputed facts in this case.

ARGUMENT

I. A TAXPAYER UNDER CRIMINAL INVESTIGATION WHO ASSERTS HIS FIFTH AMENDMENT PRIVILEGE MAY NOT BE COMPELLED TO PRODUCE PAPERS IN HIS RIGHTFUL POSSESSION.

Special Agent Cerra is a criminal investigator in the Intelligence Division of the Internal Revenue Service. (App. 6,7). The regulations define the functions of the Intelligence Division as follows:

"The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws * * * by developing information concerning alleged criminal violations thereof * * *." 36 Fed. Reg. 849 et seq (1971).

When Cerra first called on the taxpayer he informed him that he was investigating the possibility of criminal fraud and advised him of his constitutional rights. (App. 14). This was in accordance with published Internal Revenue Service policy requiring, in substance, that a special agent give a taxpayer under investigation the Miranda (Miranda v. Arizona, 384 U.S. 436) warnings. News Release I.R.-949, 1968 CCH Standard Federal Tax Reports, Par. 6946; 1975 CCH Standard Federal Tax Reports, Par. 5709.1148. The taxpayer therefore properly believed and understood that anything he might say, or any documents he might produce, could incriminate him. Maness v. Meyers, ___U.S. ___, 42 L Ed 2nd 574, 589. As the Supreme Court stated in that case:

"The [Fifth Amendment] privilege has ancient roots * * *. This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. * * * The protection does not

merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." (Maness v. Meyers, ___ U.S. ___, 42 L Ed 2d at 584, 585) (Citations omitted).

The privilege is not limited to verbal testimony. "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." Schmerber v. California, 384 U.S. 757, 763-764. And in Bellis v. United States, 417 U.S. 85, 87-88, the Court said:

"The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life."

Thus, in Bellis, the Supreme Court reaffirmed its early and oft-cited holding in Boyd v. United States, 116 U.S. 616. In Olmstead v. United States, 227 U.S. 438, 474 (dissenting opinion), Justice Brandeis described Boyd as "a case that will be remembered as long as civil liberty lives in the United States."

The government does not seek to compel the taxpayer to produce his books and records. It recognizes that they are privileged.² But the government urges that workpapers prepared by

2. The government's Brief in the Supreme Court in the Kasmir and Fisher cases refers to Couch v. United States, 409 U.S. 322 and says (at p. 25): "That case dealt with books and records which belonged to and originated with the taxpayer, and as to which the privilege presumably would have been available to her had she not relinquished possession of them."

the accountant from the same books and records, and in the taxpayer's rightful possession, somehow are not privileged. We respectfully submit that, for Fifth Amendment purposes, there is no valid basis whatever for this attempted distinction.

A. All of the Elements Entitling Taxpayer to Assert His Fifth Amendment Privilege With Respect to the Workpapers in His Possession are Present in This Case.

First, as we have shown, the taxpayer had good reason to believe that production of the workpapers would tend to incriminate him. The special agent in effect had so advised him. Secondly, the element of personal compulsion against the taxpayer is obviously present. The command of the summons is to him personally. But for the Fifth Amendment privilege, his refusal would place him in contempt of court.

The decisions in Couch v. United States, 409 U.S. 322 and Cohen v. United States, 388 F.2d 464 (C.A. 9th), discussed more fully infra, establish that possession, rather than concepts of legal title, is the significant factor for Fifth Amendment purposes. And the taxpayer's rightful possession of the documents in question is likewise beyond reasonable dispute. When the taxpayer learned that he was under criminal investigation he understandably, through his attorney, requested the documents from his accountant.

He had paid for the work and felt that he was entitled to have the papers. (App. 15). The accountant felt the same way, had no need for the papers, and turned them over without objection. (App. 16). The taxpayer thus had personal and continuous possession of the papers from January 18, 1974, and continues to have them. The summons was not served upon him until September 13, 1974 --almost eight months later. (App. 4).

There is good authority for the proposition that "even though possession is wrongfully acquired" the privilege applies. Re Grant, 198 Fed. 708, 709 (Judge L. Hand), affirmed 227 U.S. 74; United States v. Cohen, 388 F.2d 464, 469 (note 17) (C.A. 9th). But by no stretch was the taxpayer's possession wrongful in this case. The Supreme Court and others have made it clear that the rights and obligations of the parties do not become fixed until the summons is served. Couch v. United States, 409 U.S. 322, 329 (note 9); United States v. Zakutansky, 410 F.2d 68, 72 (C.A. 7th); United States v. Cohen, 388 F.2d 464 (C.A. 9th); United States v. Kasmir, 499 F.2d 444 (C.A. 5th), cert granted 43 U.S.L.W. 3412. For until then no legal action has been taken to require the taxpayer to do or to refrain from performing any action -- certainly not to bar him from accepting ownership or possession, or both, of documents in which he has a legitimate and private interest.

- B. The Fifth Amendment Privilege Applies to Workpapers in Taxpayer's Possession Prepared by An Accountant from the Taxpayer's Own Books and Records.

The Supreme Court presently has before it the cases of United States v. Kasmir, 499 F.2d 444 (C.A. 5th) and United States v. Fisher, 500 F.2d 683 (cert granted, January 27, 1975). We understand that the cases are scheduled to be argued at the October, 1975 term of the Supreme Court.

In United States v. Kasmir, 499 F.2d 444 (C.A. 5th), the taxpayer, after having been visited by two special agents, called his accountant, Candy. The next morning, Candy "delivered an assortment of records and documents" to the taxpayer. "Within minutes of receiving the materials" the taxpayer turned them over to Kasmir, his attorney. The next day the government served summonses on Candy and Kasmir, ordering them to give up the documents and to give testimony concerning them. When neither agreed to comply, the government sought enforcement. The District Court granted the government's petition. The Fifth Circuit reversed, largely on the basis of the Supreme Court decision in Couch v. United States, 409 U.S. 322 (1973). It stated:

"The Couch Court held that actual possession, rather than ownership, 'bears the most significant relationship to Fifth Amendment protections against State compulsions upon the individual accused of crime.' Couch v. United States, 409 U.S. at 333." 499 F.2d at 448.

The Fifth Circuit then held that the Fifth Amendment privilege, having attached when the taxpayer came into possession of the records, was not "decreased or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relation-

ship." (400 F.2d at 452).

In United States v. Fisher, 500 F.2d 683, a special agent, in late July of 1971, made an appointment with the taxpayer to discuss his tax liability with him. In early August of 1971 the taxpayers obtained certain records from their accountant, and on August 17, 1971, turned them over to their attorney, Fisher. On October 22, 1971, the agent served a summons for the documents on the taxpayer's accountant, and on December 1, 1971, on the attorney, Fisher. In the enforcement proceeding which followed, the District Court rejected the Fifth Amendment defense and ordered the documents produced. The Third Circuit affirmed. Unlike the Fifth Circuit in Kasmir, it held that the records were not privileged in the hands of the attorney. The majority of the Fisher Court did not decide whether the records would have been privileged in the taxpayer's hands. But the concurring and dissenting opinion of Judge Hunter in that case states:

"The government conceded in oral argument that the [taxpayers] would have retained the right to assert the privilege if they had stayed in Fisher's office while he examined the papers in their presence or if they had insisted on his reviewing the papers in their home." 500 F.2d 683, 698.

Of course the taxpayer here is in a stronger position than the taxpayers in Kasmir and Fisher. For here the government seeks to compel testimony and the production of papers from the taxpayer personally -- not the production of papers by his attorney. Nothing in this record disproves the taxpayer's claim of ownership.

(App. 15). But that is not the test. Possession is. And the taxpayer's possession of the records, unlike that of the taxpayers in Kasmir and Fisher, was not "fleeting and transitory" (United States v. Fisher, supra), but indeed still continues.

Both the Kasmir and Fisher Courts discuss the Supreme Court's decision in Couch at length. And both recognize that, as the Supreme Court there stated, possession, not ownership, "bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." Couch v. United States, 409 U.S. at 331.

In Couch, as in Kasmir and Fisher, the papers sought were not in the personal possession of the taxpayer. They were in the possession of her accountant. Although the taxpayer owned the records, the Court held that she could not invoke the Fifth Amendment privilege to their production because:

"In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything." 409 U.S. at 329. (Emphasis added).

The Court quoted from Mr. Justice Holmes in Johnson v. United States, 228 U.S. 457, 458, as follows: "A party is privileged from producing the evidence but not from its production." (409 U.S. at 328.) The Court distinguished Boyd v. United States, 116 U.S. 616, because there, "the person asserting the privilege was in possession of the written statements in question." (409 U.S. at

330.) The Court also referred to and quoted from the decision of the Ninth Circuit in United States v. Cohen, 388 F.2d 464 as follows:

"See also United States v. Cohen, 388 F.2d 464, 468 (C.A. 9th, 1967), where the court, in upholding the right of a possessor, nonowner, to assert the privilege, noted that 'it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.' Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." (Emphasis added). (Couch v. United States, 409 U.S. 322, note 12.)

Applying the Couch rationale, "the ingredient of personal compulsion against" this taxpayer is present. This taxpayer falls squarely within Justice Holme's description of, "a party [who] is privileged from producing the evidence * * *." Johnson v. United States, 228 U.S. 457, 458.

As noted, it was the Cohen rationale which the Supreme Court expressly singled out and quoted from with approval. And that case, more than either Kasmir or Fisher, is squarely in point with the instant case. There, the day after the special agent called on him, Cohen obtained workpapers, correspondence and other documents from the accountant. The special agent then served a summons on Cohen, and enforcement proceedings followed. Affirming the District Court, the Ninth Circuit held that the Fifth Amendment applied. It rejected ownership as the test of privilege in favor of possession. It held that "possession of potentially incrimin-

ating documents is * * * the necessary and sufficient condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his." It was this rationale which the Supreme Court subsequently approved in Couch. Lower court cases antedating Couch, reaching a different result, accordingly are no longer authoritative. Though the Supreme Court in Couch did not have to pass upon the precise issue involved in Cohen and in this case, surely the Court would not have singled out the Cohen rationale for approval and quotation if it disagreed with the basic holding in Cohen that workpapers in a taxpayer's hands are privileged under the Fifth Amendment.³

The government apparently claims that accountants' workpapers, in the taxpayer's possession, are not sufficiently "personal" or "private" to qualify for the privilege, although the very books and records from which they are derived admittedly are. This, we submit, does not bear analysis. The workpapers are merely reflections and summaries of the same personal and financial data as the books from which they are taken. In no sense are they "public documents." United States v. Cohen, 388 F.2d at 471, 472. Nor is the privilege lost because the entries are not made with the taxpayer's own hand. Wilson v. United States, 221 U.S. 361, 378.

3. Obviously the Supreme Court would not have referred to "rightful possession" as "enabling the possessor to assert the privilege" (Couch, supra, note 12) if ownership is also required.

Suppose, for example, that a taxpayer delivers his books and records to his accountant for checking or analysis, and the accountant then returns them. No one would claim that the books lose their privileged character in this process. And surely the result is no different if the accountant, as customarily is the case, totals the books or makes adjusting and closing entries. (The summons in this case demands production, among other things, of "adjusting entries" and "closing entries.") (App. 6). Where the accountant also prepares trial balances or balance sheets from the same records, the situation, for Fifth Amendment purposes, is the same. The accountant has merely transmuted the data in the books into summary form. The government could of course properly direct a summons to the accountant for the workpapers -- and for that matter for the underlying books. Couch v. United States, supra. But once the books and workpapers are turned over or returned to the taxpayer, the privilege applies to the totality of this information which originated with the taxpayer in the first place, and which contains his personal and financial data. To compel the taxpayer to produce this data pursuant to summons is to compel him to testify in violation of his Fifth Amendment privilege. In this connection, it is noted that the landmark case of Boyd v. United States, 116 U.S. 616 itself involved an invoice which Boyd received from a third party. Though the government could have reached the invoice or a copy from the

originator, the Supreme Court held that it could not require Boyd to produce it.

In Maness v. Meyers, ___ U.S. ___, 42 L Ed 2d 574, the issue was whether an attorney could be held in contempt for advising his client, on Fifth Amendment grounds, not to produce allegedly obscene magazines pursuant to subpoena. Finding that there was "at the very least, a reasonable basis for petitioner to assume that a risk of further criminal prosecution existed" (42 L Ed 2d at 589), the Supreme Court held that the lawyer could not be held in contempt. It expressly refrained from deciding "whether the Fifth Amendment privilege actually encompasses these magazines." (42 L Ed 2d at 589, note 18). But, in referring to Maness in its memorandum in this Court on the Motion for Stay in this case, the government says, "Clearly, the validity of the claim of privilege was, unlike that here, obvious." (Government's Memorandum on Motion for Stay, p. 5, footnote). If the bookseller in Maness had an "obvious" privilege with respect to obscene books, as the government says, it borders on the ridiculous for it to contend that the taxpayer here does not have a privilege with respect to these workpapers derived from his own books and containing his own personal and financial information.

Finally, while it is a lower court decision, we respectfully call the Court's attention to the case of United States v. DeCastro, West and Chodorow, Inc., ___ F. Supp. ___, 75-2 U.S.T.C., par. 9535.

decided by the District Court for the Central District of California on February 26, 1975. The Court there held, in a well reasoned opinion, that accountants' records and workpapers used in the preparation of returns were privileged under the Fifth Amendment although the taxpayer had them in his actual possession for no more than fifteen minutes before turning them over to his attorney. The Court found persuasive the reasoning and decision in United States v. Kasmir, 499 F.2d 444 (C.A. 5th).

C. The Government's Action in This Case is Directly Contrary to Its Publicly Announced Policies.

On November 26, 1968, the Internal Revenue Service issued News Release IR-949, as follows:

"The IRS has announced that a taxpayer in a criminal noncustody investigation will be advised of his constitutional rights in the following manner. At the initial meeting, a special agent is now required to identify himself, describe his functions, and advise the taxpayer that anything he says may be used against him, that he cannot be compelled to incriminate himself by answering questions or producing documents, and that he has the right to seek the assistance of an attorney before responding." (1968 CCH Standard Federal Tax Reports, par. 6946; digested in 1975 CCH Standard Federal Tax Reports, par. 5709.1148). (Emphasis added).

The First and Fourth Circuits have held that these requirements must be strictly observed. United States v. Leahey, 434 F.2d 7 (C.A. 1st), and United States v. Heffner, 420 F.2d 809 (C.A. 4th). The special agent properly followed this procedure in this case (App. 14). The government release specifically says that a taxpayer may not be compelled to incriminate himself "by answering questions or producing documents * * *." The release properly does not except from the privilege documents rightfully in a

taxpayer's possession which he has obtained from a third person, and there is no basis in the release or in the law for engrafting such an exception. The government now seeks to compel the taxpayer, by its summons (App. 6), to give testimony and produce documents which the government itself has publicly described as privileged. The government is bound by its own publicly announced policies and rulings. United States v. Nixon, 418 U.S. 683, 694-696; United States v. Leahey, 434 F.2d 7 (C.A. 1st); United States v. Heffner, 420 F.2d 809 (C.A. 4th). This in itself is a sufficient basis for holding that the summons in the present case should not be enforced.

II. IN REQUIRING THAT THE TAXPAYER GIVE TESTIMONY, THE SUMMONS IS PLAINLY UNENFORCEABLE.

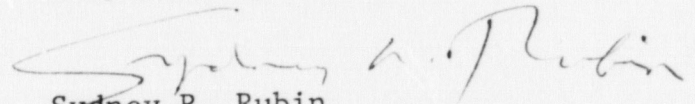
The summons directs, not only that the taxpayer produce the accountant's workpapers, but that he give testimony concerning his own tax liability. (App. 6). To compel the taxpayer's testimony in a special investigation, where he has properly invoked the Fifth Amendment privilege, would squarely contravene the literal interdiction of the Fifth Amendment provision that, "No person * * * shall be compelled in any criminal case to be a witness against himself * * *." Obviously, in this respect at least, the summons, and the order of the Court below enforcing it, go too far. Otherwise, it is difficult to conceive of a tax case -- or for that matter any investigation which might result in criminal prosecution -- in which the protection of the Fifth Amendment

would apply. To hold otherwise, we submit, would be to read the Fifth Amendment out of the Constitution.

CONCLUSION

The order of the Court below should be reversed, with instructions to dismiss the petition to enforce the summons.

Respectfully submitted,



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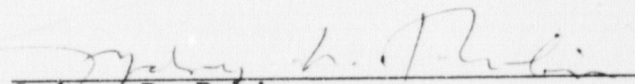
CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief for Appellant has been made this 1st day of July, 1975 on counsel for Appellees by depositing copies thereof in the United States Mail, postage prepaid, addressed to:

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